LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 22 1967
JOHN F. DAVIS, CLERK

No. ~~1417~~ 186

IN THE

SUPREME COURT OF THE UNITED STATES

1967

JAMES B. HENSLEY, *Petitioner*

vs.

FORT WORTH AND DENVER RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, FORT WORTH, TEXAS

SPURLOCK & SCHATTMAN
DENNING SCHATTMAN
Attorneys for Petitioner
304 Union Bank Building
Fort Worth, Texas 76102

Fort Worth Brief Printing Co., 610 E. Jennings Street Phone ED 2-4070

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	11
Appendix A	12
Appendix B	19
Appendix C	21
Appendix D	25
Certificate of Service	41

CITATIONS

Cases: Page

Arnold v. Panhandle & S.F.R. Co., (1957)
353 U.S. 360, 1 L.ed. 2d 889, 77 S.Ct. 840 ..... 7, 8

Bailey v. Central Vermont Ry. Inc., (1943)
319 U.S. 350, 63 S.Ct. 1062, 87 L.ed. 1444 7

Dice v. Akron, Canton and Youngstown R.R. Co.,
(1952) 342 U.S. 359, 72 S.Ct. 312, 96 L.ed. 398 7

Jesionowski v. Boston and Maine R. Co., (1947)
329 U.S. 452, 456, 67 S.Ct. 401, 91 L.ed. 416,
169 A.L.R. 947 6

Mills v. Mitsubishi Shipping Company, (1966)
358 Fed. 2d 609 (CA 5) 9

Moore v. Atcheson, Topeka & Santa Fe Co., (1960)
171 N.E. 2d 393, 97 A.L.R. 2d 511 7

Roberts v. T & P Railway Co., (1944)
180 S.W. 2d 330 7

Sweeney v. Erving, (1913) 228 U.S. 233,
57 L.ed. 815, 33 S.Ct. 416, 417, 418 6

Thompson v. Gibson, (1957) 156 Tex. 593,
298 S.W. 2d 97 8

Thompson v. Robbins, (1957) 157 Tex. 463,
304 S.W. 2d 111 8

Texts:

McCormick on Evidence, p. 644 7

Prosser on Torts (second edition, 1955) p. 212 7

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES B. HENSLEY, *Petitioner*

vs.

FORT WORTH AND DENVER RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, FORT WORTH, TEXAS

The Plaintiff, James B. Hensley prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, entered November 4, 1966, is reported at 408 S.W. 2d 761. The Application for Writ of Error to the Supreme Court of Texas was refused, no reversible error, on February 15, 1967, and Motion for Re-hearing was overruled by the Supreme Court of Texas March 15, 1967.

JURISDICTION

The Judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth was entered on November 4, 1966 (Appendix A, infra, p. 12) the jurisdiction of the Court is invoked under 28 United States Code 1257(3).

QUESTION PRESENTED

(1) Whether in an action under the Federal Employers Liability Act a state court decision can supercede the Federal Court decisions on the applicability of the doctrine of res ipsa loquitor.

(2) Whether the civil procedure of a state, in this instance Texas, takes precedent over the substantive requirements of the Federal Employers Liability Act in the trial to a jury of an employee's suit against his employer for damages arising out of personal injury.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B, infra, p. 19, 45 U.S.C.A., Sections 51 and 54, of the Federal Employers Liability Act.

STATEMENT

Pertinent excerpts from the testimony reported in the Statement of Facts is set forth in Appendix C, infra, p. 21.

This suit involved a derailment on October 12, 1963 between 7 and 8 p.m. in Plainview, Texas. The hour of the derailment is significant. The incident occurred

during a switching movement involving a road engine which was shoving approximately ten cars south at night on a track known as the "Alley Lead". The derailment happened when the second car in the cut split the switch going to the Magnolia track which came off the east side of the lead. Defendant's brakeman Rucker was riding the point of the movement and checked the switch points, the upright switchstand and the switch handle, finding all in their proper place and lined for the alley lead. Plaintiff Hensley was riding the top of the third boxcar in a position to relay signals to the engineer since the movement was shortly due to go around a curve. He was riding on the west side, the engineer's side, and the switch stand was on the east side of the track. One explanation made by brakeman Rucker was that the movement of the cars over the track vibrated the points apart permitting the rear trucks of the second boxcar to go down the Magnolia track and derailing the movement. (App. C pp. 21, 22) At the close of Defendant's evidence Plaintiff moved for an instructed verdict under the doctrine of res ipsa loquitur since the evidence was undisputed that the track, bed, switch and boxcars were under the exclusive control and management of the Defendant and that Plaintiff Hensley could have in no manner been guilty of contributory negligence. The Defendant offered no evidence to explain how the derailment could have happened not negligently.

This motion was denied and the case was then submitted to the jury on special issues. The Plaintiff requested three instructions to go to the jury along with

the issues since the Court was instructing in submitting an issue on comparative negligence and also an issue on unavoidable accident. One instruction requested of the Court was that it inform the jury that the Defendant carrier would be liable to the Plaintiff for any injuries resulting in whole or in part from the negligence of the Defendant, its agents, servants and employees; also an instruction informing the jury that the Plaintiff did not assume the risks of his employment; and a third instruction informing the jury that the Defendant was under the duty to exercise ordinary care to provide Plaintiff with a reasonably safe place to work. These instructions were refused. The jury answered the issues that the track and road bed was under the exclusive control of the Defendant, found no element of negligence against either Defendant or Plaintiff and stated that the derailment was due to an unavoidable accident.

The only attempt by the Defendant to explain the derailment was testimony of a little boy that in the middle of October sometime before five o'clock in the evening he and another school friend had fooled with a switch. The testimony further developed that the railroad authorities came to the boy's home the very day that he was alleged to have played with a switch and spoke to his mother about it and that this occurred about 5:00 p.m. before dinner. The derailment did not occur until about 8:00 p.m. Neither the switch nor the day in October was ever established. (App. C pp. 22, 23)

In its opinion on November 4, 1966, affirming judg-

ment for Defendant, the Court of Civil Appeals conceded that the evidence showed that the switch handle was insecurely fastened in the slot and that the vibration from the cars caused the switch to open resulting in the derailment. The opinion further reveals that one Justice was of the opinion that the evidence of the boys tampering with a switch failed to show any connection with the switch in question while the other two Justices believed otherwise, but that all of them were of the opinion that the switch handle could not have been out of the slot or insecurely fastened but for the tampering of person or persons unknown. The Court of Appeals concluded that the trial court properly denied Plaintiff's motion for instructed verdict and for judgment non obstante verdicto as there was adequate proof constituting an explanation and excuse for the condition of the insecure switch and switch handle. This, despite the fact that there is no evidence to such effect in the entire record.

The Court of Civil Appeals further upheld the trial court's refusal of Plaintiff's requested instructions on the ground that giving such instructions would have amounted to a general charge on the law and would have been error under the local practice. Court's Charge and requested Instructions, App. D, infra, pp. 25-40.

Plaintiff's Application for Writ of Error to the Supreme Court of Texas was refused, no reversible error, on February 15, 1967 and Motion for Re-hearing was overruled by that Court March 15, 1967.

REASONS FOR GRANTING WRIT

The decisions below are contrary to the Federal decisions under the Federal Employers Liability Act on the question of the applicability of the doctrine of res ipsa loquitur and further, in the submission of a case to a jury, is an attempt to make state procedure controlling over the substantive rights of employees under the Federal Employers Liability Act as established by Federal decisions.

1. Both the trial court and the Court of Appeals failed to apply the standard established by the Supreme Court of the United States in applying the doctrine of res ipsa loquitur in a case involving the Federal Liability Act. The doctrine is set forth in *Sweeney v. Erving* (1913) 228 U.S. 233, 57 L.ed. 815, 33 S.Ct. 416, 417, 418. There it was said that the thing speaks for itself and if there is nothing to explain or rebut the inference that arises from the way in which the thing happened it may fairly be found to have been occasioned by negligence. Plaintiff's position is further supported by *Jesionowski v. Boston and Maine R. Company*, (1947) 329 U.S. 452, 456, 67 S.Ct. 401, 91 L.ed. 416, 169 A.L.R. 947, which also involved a derailment and where the court characterized derailments as extraordinary, not usual happenings. Defendant's assistant superintendent was in charge of the territory agreed that a derailment is an extraordinary happening and does not usually occur unless there is something wrong. (App. C p. 24) The Defendant introduced no evidence to explain how the derailment could have occurred not negligently,

and at the conclusion of Defendant's case Plaintiff was entitled to an instructed verdict as requested. In *Jesionowski* this Court said with Plaintiff free from any negligent act, "We have left an accident ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, the only other agency involved.***It was uncontroverted that the railroad had exclusive control .... We think that the (plaintiff's) conduct did not cause the accident and that the railroad's negligence did." While in most instances the doctrine of res ipsa loquitur gives rise only to an inference of negligence, under the proper circumstances a Plaintiff would be entitled to a directed verdict where the inference of negligence is so strong that reasonable men could not reject it. *Roberts vs. T & P Railway Company*, (1944), 180 S.W. 2d 330; *Moore v. Atcheson, Topeka & Santa Fe Company*, (1960), 171 N.E. 2d 393, 97 A.L.R. 2d 511; also *Prosser on Torts* (Second Edition, 1955) p. 212; *McCormick on Evidence*, p. 644.

2. Local procedure will not be permitted to interfere with the substantive Federal rights afforded plaintiffs under the Federal Employers Liability Act. *Dice v. Akron, Canton and Youngstown R.R. Co.*, (1952), 342 U.S. 359, 72 S.Ct. 312, 96 L.ed. 398; *Bailey v. Central Vermont Ry. Inc.*, (1943) 319 U.S. 350, 63 S.Ct. 1062, 87 L.ed. 1444; and *Arnold v. Panhandle & S.F. R. Co.*, (1957), 353 U.S. 360, 1 L.ed. 2d 889, 77 S.Ct. 840. With reference to the instructions requested by Plaintiff to be given in the Court's charge to the jury, the trial court was apparently of

the same opinion announced by the Court of Civil Appeals in its opinion that such an instruction to the jury on the law would have amounted to a general charge and would have been error under Texas Procedure. At each confrontation the Texas Rules of Procedure have had to give way to the substantive requirements of the Federal Act. In *Thompson v. Gibson*, (1957) 156 Tex. 593, 298 S.W. 2d 97, the Supreme Court of Texas held that the question of no evidence was to be determined by the evidence in the light of the trial court's charge and the decisions pertinent to that particular question involved. This Court reversed that decision in 355 U.S. 18, 2 L.ed. 2d 1, 78 S.Ct. 2, and the Texas court reformed its decision in 158 Tex. 231, 310 S.W. 2d 564. In the *Arnold* case, supra, the Texas courts held that a general verdict had to yield to inconsistent findings on special issues in conformity with Texas procedure. This Court again turned back the procedural invasion of substantive Federal rights stating that it could not accept interpretations which nullified the effectiveness of Federal rights and that Federal rights were not to be defeated under the name of local practice. The only basis for refusing to give Plaintiff's requested instructions is the principal of local procedure that states special issues should be so framed as to not inform the jury of the effect of its answers. *Thompson v. Robbins*, (1957) 157 Tex. 463, 304 S.W. 2d 111. Unless the issue is so framed, it is considered, as stated by the Court of Civil Appeals below, a general verdict. The refusal of the trial court to instruct as requested, when combined with the special issues on comparative negligence and unavoid-

able accident, deprived Plaintiff of an intelligent consideration of his cause by the jury and deprived him of his substantive rights under the Act. The only logical conclusion that can be reached is that the jury believe that Plaintiff assumed the risks of his employment and that the derailment was an unavoidable accident.

The issue of unavoidable accident is not a controlling issue and is merely a fracturing or cross-examination of the jury on the question of negligence and causation. *Mills v. Mitsubishi Shipping Company*, 358 Fed. 2d 609 (1966) (CA 5). The *Mills* case involved a question of unseaworthiness under the Jones Act. In its opinion the Fifth Circuit Court of Appeals discussed the question of unavoidable accident both under the Jones Act and the Federal Employers Liability Act. At page 614 of its opinion it said:

> "This leaves only the finding that Mills' injuries 'were the result of an unavoidable accident.' Its presence is a sharp reminder of the confusion resulting from the importation of this essentially Texas device leading to discountenance of its use in FELA and federally created maritime claims. Page v. St. Louis Southwestern Ry., 5 Cir., 1963, 312 F 2d 84, 93, 98 A.L.R. 2d 639. Of lumping sole proximate cause with unavoidable accident, we said on the second go-round in Page:
>
> > 'We deem it a matter of good judicial administration to point out now, as we did formerly on unavoidable accident, that ordinarily in FELA cases there is really no place for this issue in the jury submission as such. All of these collateral devices so dear to the heart of

> Texas bred and Texas trained lawyers immersed in its complex system of special issues submission are in reality merely a submission in another form of questions already implicit in the basic ones of the (a) Railroad's negligence, (b) causation by reason of the Railroad's negligence, (c) the injured worker's negligence, (d) causation by reason of the worker's negligence, and (e) the percentage reduction of damages.' Page v. St. Louis Southwestern Ry., 5 Cir. 1965, 349 F 2d 820, 826.

"And certainly it was so here. For apart from the general instruction that the happening of an occurrence does not necessarily establish negligence (see Page 11, 349 F 2d at 825), the definition of an unavoidable accident as 'an . . . event or occurrence, happening suddenly . . . not proximately caused by any unseaworthy condition of the vessel or her appurtenances,' served only 'to cross examine the jury', Page 11, 349 F. 2d at 826, as to a matter already submitted in a different form. The pudding's eating proof is that our holding of unseaworthiness as a matter of law automatically destroys the finding of unavoidable accident pursuant to this definitional instruction."

In the instant case both the trial court and the Court of Civil Appeals should have ignored the jury's finding of unavoidable accident and should have instructed verdict and judgment for the Plaintiff.

CONCLUSION

To protect the employees substantive rights under the Federal Employers Liability Act from erosion through the application of state procedural rules and to maintain the integrity of the decisions of this Court in the *Jesionowski* case and *Sweeney* case the petition for writ of certiorari should be granted.

Respectfully submitted,

SPURLOCK & SCHATTMAN

By /s/ Dennis Schattman

DENNING SCHATTMAN
304 Union Bank Building
Fort Worth, Texas 76102
Attorney for Petitioner

APPENDIX A

No. 16768

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

JAMES B. HENSLEY, Appellant

vs.

FORT WORTH AND DENVER RAILWAY COMPANY, Appellee

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

Suit was under the Federal Employers' Liability Act by James B. Hensley, as plaintiff, against his employer the Fort Worth and Denver Railway Company. Trial was to a jury, which returned answers to special issues upon which the court entered a judgment for the defendant. Plaintiff appealed.

Judgment affirmed.

In the instant case issues under the doctrine of *res ipsa loquitor* were raised under the pleadings and the evidence. The instrumentality involved was a railroad switch. The switch was of the type which when "thrown" in one direction would cause a train passing over the tracks controlled thereby to go forward onto one path, but which when "thrown" in the other direction would cause the train to go for-

ward onto another path. The securing of the switch, so that directional control of the train would be constant, involved manual pressure exerted on the switch-handle, which controlled the switching result, so that a part thereof went into a slot and there remained so that the movable portion of the tracks themselves would not move—being secured by the presence of the handle in the slot. There were two slots for positioning the switch-handle, one for directional control of the train onto one set of tracks, and the second for directional control of the train onto other tracks.

Evidence in the record showed not only that the switch-handle was out of (or insecurely fastened in) the slot in which it was supposed to rest, but furthermore presented a situation from which the jury was entitled to conclude (as it did) that the vibration from the cars of a train which was in the process of passing over the roadbed caused movement in the switch (and accompanying movement in the insecurely positioned switch-handle) allowing the front of the railroad car on which plaintiff was riding to go to the right on one set of tracks—and allowing the rear of the same railroad car to proceed straight ahead on the other set of tracks. A derailment resulted, and in consequence thereof plaintiff fell or was thrown from the car and sustained personal injuries.

It is conceded by the defendent railroad that the plaintiff made out his *prima facie* case under the doctrine of *res ipsa loquitor*. Defendent insists that its evidence met the requisite of providing justifica-

tion and excuse for the derailment and resultant injuries to the plaintiff, a theory advanced as part of its defense. It is defendant's contention that its evidence showed that two young boys were taking a short cut from school on the day immediately prior to the evening on which the derailment occurred, and that during the course thereof they manipulated the switch-handle so that it came out of the slot in which it was supposed to remain secured, leaving it in such condition that vibration of the railroad cars resulted in the derailment. The author of this opinion believes such evidence failed in that the action of the boys was not shown to have had connection with the switch in question and/or was not shown to have had connection at a material time. The other two members of the Court are not in accord, and they believe that there was evidence from which the jury was entitled to conclude that the boys did tamper with the switch in question thereby occasioning the derailment. However, all members are of the opinion that there was other evidence competent to show that the switch-handle could not have been out of (or insecurely fastened in) the slot but for tampering by person or persons unknown.

In any event the plaintiff failed to obtain jury findings sufficient to support a judgment for him against the defendant under the doctrine of *res ipsa loquitor*. The jury in response to the issues submitted found that the track and roadbed involved was under the exclusive control and direction of the defendant, its agents and employees. (This was undisputed.) However, it further found that the defendant railway

"did not fail" to use ordinary care to have and maintain the track and roadbed in a reasonably safe condition at the place and on the occasion in question. Because of the conditional submission of the issue the jury was not required to answer the inquiry as to whether defendant's failure to exercise care contributed to cause plaintiff's injuries.

As we view the case the plaintiff simply failed to sustain his burden of proof. Other than in an exceptional *res ipsa loquitor* case the plaintiff must have his case submitted to the jury. (The instant situation is not such an exceptional case.) Submission is ordinarily by a general issue asking if the defendant was negligenct in the manner of his handling of the instrumentality involved, with a corollary issue on proximate cause—or—in a Federal Employers' Liability Act (FELA) case a corollary issue on "contributing cause, in whole or in part". An issue inquiring as to the prerequisite of exclusive control of the instrumentality by the defendant may or may not be necessary to be submitted to the jury, depending upon whether the factual situation existent under the facts of the case raises the issue. However, whether submission thereof is requisite or not would have no bearing upon the necessity for the plaintiff to obtain jury findings on negligence and cause. Under no theory would the plaintiff in the case under scrutiny be entitled to receive an instructed verdict or a judgment *non obstante veredicto*, even when we treat the "track and roadbed at the place in question" as constituting the instrumentality involved.

See Hodges on Special Issue Submission in Texas,

p. 106, "Size and number of issues", § 39, "Particular Problems in Negligence Cases"; Note, 36 Tex. Law Review 698; 40 Tex. Jur. 2d 679, "Neligence", § 149, "(Res Ipsa Loquitor)—Effect of application": Houston, E. & W. T. Ry. Co. v. Roach, 114 S. W. 418 (CCA of Texas, 1908, writ refused); Simpson v. Dallas Ry. & Terminal Co., 143 S. W. 2d 416 (Dallas Civ. App., 1940, writ dism., judgm. correct); Gaunce v. Gulf, C. & S. F. Ry Co., 48 S. W. 524 (CCA of Texas, 1898, no writ hist.), and discussion of cases beginning on page 526.

Plaintiff points out that federal decisions are controlling on the question of the applicability of the dectrine of *res ipsa loquitor*. However, we do not perceive wherein the federal decisions differ from those in other Texas cases. The principal case cited by appellant is Moore v. Atchison, Topeka and Santa Fe Railway Co., 28 Ill. App. 2d 340, 171 N. E. 2d 393, 97 A. L. R. 2d 511 (1961), a case where it was held that the doctrine had application and that (despite the jury's verdict for the defendant railroad the unexplained and unexcused movement of a train through a red signal and thus upon a main line where there was a collision of trains entitled plaintiff to an instructed verdict on the matter of liability for injuries resulting in death to a railroad employee. Obviously this was an exceptional case, and we must agree with a statement quoted from the opinion, viz: " 'The time will probably never come when a collision resulting from an attempt to have two trains going at full speed, in opposite directions, pass each other on the same track, will not be held to be

negligence, in law.' "

In the Moore case it was said: "The doctrine of *res ipsa loquitor* 'means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, ont necessarily that they require it; that they make a case to be decided by the jury not that they forestall the verdict. *Res ipsa loquitor*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff! Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 418, 57 L. Ed. 815." This we likewise understand to be the law in Texas whether the case is under the Federal Employers' Liability Act or otherwise.

It is the usual, not exceptional, case to which the quoted language in the preceding paragraph has reference. In our opinion the instant case is not the exceptional. Furthermore, as already stated, there is adequate proof constituting an explanation and excuse for the condition of the insecure switch and switch-handle, despite the defendant's failure to show by any direct evidence that the boys were the parties who had tampered with such. The trial court did not err in overruling motions for instructed verdict and for judgment *non obstante veredicto*.

Plaintiff also complains because of the trial court's refusal to submit three separate instructions as part of its charge to the jury. One instruction set forth the liability of the defendant for injuries to its employees resulting in whole or in part from negligence of its employees, officers or agents. The second instruction informed the jury that an employee of a railroad, such as the plaintiff, did not assume the risks of his employment. The third instruction informed the jury that the defendant was under the duty to exercise ordinary care to provide plaintiff with a reasonably safe place to work. It is the plaintiff's contention that all three of the requested instructions constituted a departure from the usual rules governing the relationship of master and servant at common law without knowledge of which the jury could not intelligently answer certain special issues. The jury did answer such issues against the plaintiff.

Plaintiff has cited no authority for the novel proposition he advances. He apparently regards it as a substantive federal right which must be given effect over local law which he assumes is to the contrary. Under the charge of the court the jury was not permitted to speculate upon any supposed knowledge of unmodified common law. Had the court instructed the jury on the law, simply because it was a modification of the common law, it would have amounted to a general charge on the law, error under our practice if objected to by a litigant. 57 Tex. Jur. 2d 200, "Trial", § 512, "Instructions prohibited — General charges on law." More materially, however, plaintiff cannot demonstrate any prejudice to have been the

result of the court's refusal of the instructions affecting his interest.

Judgment is affirmed.

/s/ Frank A. Massey
Frank A Massey
Chief Justice

APPENDIX B

45 United States Code Annotated

"§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404."

"§ 54. Assumption of risks of employment

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug 11, 1939, c. 685, § 1, 53 Stat. 1404."

APPENDIX C

EXCERPTS FROM STATEMENT OF FACTS

WITNESS BRAKEMAN RUCKER.

Page 271 S.F.

"Q. So again in order to move safely through this switch, it is necessary to know that that handle is in the socket, isn't that correct?
A. That's right.
. . .
Q. Now, you said in response to a question by Mr. Law that that particular switch was hard to determine whether or not that was in the socket or not, the handle in the socket; is that correct?
A. Yes."

Page 272 S.F.

"Q. Now, if that handle is in the socket when you go by and the vibrations of the train pull it out, that could open your switch points too, could it not?
A. That is right."

Page 274 S.F.

"Q. Disk target. Was it properly aligned for your movement?
A. Yes, I shined the light on it and the points, as we went by, and it looked normal to me.
Q. And in order to throw that switch, you have got to pull the handle out of a bracket or slot?
A. Slot.
Q. Was the handle down in the slot properly as you went by?
A. As far as I could see, it was.
Q. Well, you looked at it, didn't you?
A. I throwed my light over on it.

Q. It was in the slot, wasn't it?
A. Yes, sir."

WITNESS SECTION FOREMAN K. C. BUTCHER

Page 322 S.F.

"Q. And if in truth and in fact that handle is in the socket and it is vibrated out of the socket by the passage of the train and the cars on the switch, then that is a defective switch, is it not?
A. Yes, sir."

WITNESS NINE YEAR OLD BOY
JOE RODRIQUEZ

Page 355, 356 S.F.

"Q. Do you remember about when that happened, Joe?
A. It was October.
Q. And what year was it? Do you know what year it was?
A. 1963.
Q. All right. And is this your mother who is sitting here with you?
A. Yes, sir.
Q. And was she there when the men talked to you about it?
A. Yes, sir.
...
Q. Joe, you are how old now?
A. Nine.
Q. You are nine; when is your birthday, Joe?
A. I don't remember it; I forget it.
Q. When was it now when you played with the switch.
A. October.

Q. What year?
A. 1963.
Q. Joe, just a few minutes after you got home didn't a policeman and a railroad man come to see you?
A. Yes, sir.
Q. Was that before you ate supper?
A. Yes, sir.
Q. And you told them then what you had done, didn't you?
A. Yes, sir."

Page 361 S.F.

"Q. Do you remember the day that the men came to see you?
A. Yes.
Q. That was the same day that you played with the switch, wasn't it?
A. Yes."

WITNESS MRS. EVA RODRIQUEZ

Page 359-360 S.F.

"Q. Did they come the same day that the boy stayed later at school?
A. Yes.
Q. Was one of those men a police officer and the other a railroad man?
A. They told me it was a policemen from the railroad.
Q. Did the boy, Joe, your son, tell them that he had played with the switch that same afternoon that the men were there?
A. Yes.
Q. Ask her (addressing the interpreter) if all of this took place before five o'clock in the afternoon?
A. Yes."

WITNESS ASST. SUPT. J. P. NELSON

Page 439, S.F.

Q. Is it the usual and normal thing in the operation of your railroad to have cars and trains derail?

A. No, sir.

Q. So that when you do have a derailment that is something unusual, is it not?

A. Yes, sir.

APPENDIX D

No. 34,268-C

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 67th JUDICIAL DISTRICT

JAMES B. HENSLEY, Plaintiff

VS.

FORT WORTH AND DENVER RAILWAY COMPANY, Defendant

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you on special issues propounded to you in the form of questions as to particular facts. You are called on to answer these questions by unanimous consent of the jury from the evidence heard in this trial. In discharging your responsibility on this jury, please remember there are standards of conduct to be lived up to, and rules to be obeyed, and if you do not comply with them our efforts will be wasted.

Do not let bias, prejudice, sympathy, resentment, or any other such emotion play any part in your deliberations.

Do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be discussed in your hearing, except in the juryroom when all jurors are present for the purpose of deliberating on the verdict.

Hold yourselves apart from the lawyers, the wit-

nesses, and the parties to the suit. They are compelled to hold themselves apart from you, and they understand your aloofness.

Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

Be careful not to mention or discuss any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard on this trial. Do not try to gather any evidence for yourselves. Your duty is to answer these questions from the evidence you have heard in this trial and from that alone.

Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result.

Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way.

Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless.

Simply answer the questions as hereinafter instructed without concerning yourselves about the effect of your answers upon the judgment in the case or upon the parties to the suit.

Keep these instructions in mind at all times. Obey them strictly, until you have returned your verdict herein. The verdict will consist of your answers by unanimous consent of the jury to the questions written in the blanks provided, with the certificate signed by your foreman on the last page of this charge.

The following definitions are given you by the court. Whenever any of the terms so defined are used in any of the special issues submitted to you, you will refer to the appropriate definition and be guided thereby in considering your answers.

By the term PREPONDERANCE OF THE EVIDENCE, as used herein, is meant the greater weight and degree of credible evidence before you.

1.

ORDINARY CARE, as that term is used in this charge, means that degree of care that an ordinary prudent person would exercise under the same or similar circumstances.

2.

NEGLIGENCE, as that term is used in this charge, means the doing of that which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do that which an ordinarily prudent person would have done under the same or similar circumstances.

3.

CAUSE, as that term is used in these issues, means that act or omission that played any part no matter

how small, in contributing in any way or manner toward the injury or occurrence complained of. It need not be the sole cause but must be a concurring cause which contributed in any manner, however, small, to the production of the result in question. There may be more than one cause but there can be only one sole cause.

4.

By the term PROPER LOOKOUT as used in this charge means that lookout that an ordinarily prudent person in the exercise of ordinary care would maintain under the same or similar circumstances.

SPECIAL ISSUE NO. 1:

Do you find from a preponderance of the evidence that the track and road bed at the place in question was under the exclusive control and direction of the defendant railway company and its agents and employees,

Answer: "Yes" or "No" Answer: Yes

SPECIAL ISSUE NO. 2:

If you have answered Special Issue No. 1 above "Yes" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that the defendant railway failed to use ordinary care to have and maintain the track and road bed in reasonably safe condition at the place and on the occasion

in question?

Answer: "It did fail" or "It did not fail"

Answer: It did not fail

SPECIAL ISSUE NO. 3:

If you have answered Special Issue No. 2 above "It did fail" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such failure to use ordinary care, if you have so found, was a contributing cause, in whole or in part, of the injuries, if any, sustained by JAMES BRUCE HENSLEY.

Answer: "Yes" or "No" Answer: .....

SPECIAL ISSUE NO. 4:

Do you find from a preponderance of the evidence that at the time and on the occasion in question the defendant failed to provide plaintiff with a reasonably safe place to work?

Answer: "Yes" or "No" Answer: No

SPECIAL ISSUE NO. 5:

If you have answered Special Issue No. 4 above "Yes" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such failure, if any, as inquired about in Special Issue No. 4 above, was negligence?

Answer: "Yes" or "No" Answer: .....

SPECIAL ISSUE NO. 6:

If you have answered Special Issue No. 5 above "Yes" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such negligence, if any, was a contributing cause, in whole or in part, of plaintiff's injuries, if any.

Answer: "Yes" or "No" Answer: .....

SPECIAL ISSUE NO. 7:

Do you find from a preponderance of the evidence that at the time and on the occasion in question that a switch point of the switch to the Magnolia Track from the Alley Track was broken?

Answer: "Yes" or "No" Answer: No

SPECIAL ISSUE NO. 8:

If you have answered Special Issue No. 7 above "Yes" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that at the time and on the occasion in question the defendant failed to replace the broken point of the switch to the Magnolia Track from the Alley Track, if you have so found that said point was broken, at the place and on the occasion in question?

Answer: "Yes" or "No" Answer: .....

SPECIAL ISSUE NO. 9:

If you have answered Special Issue No. 8 above "Yes" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such failure, if any, as inquired about in Special Issue No. 8 above, was negligence?

Answer: "Yes" or "No" Answer:

Answer: "Yes" or "No" Answer: .....

If you have answered Special Issue No. 9 above "Yes" and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such negligence, if any, was a contributing cause, in whole or in part, of plaintiff's injuries, if any?

Answer: "Yes" or "No" Answer: .....

SPECIAL ISSUE NO. 11:

Do you find from a preponderance of the evidence that the Fort Worth & Denver Railway Company was negligent in failing to provide the switch in question with a switchlock on the occasion in question?

Answer "It was" or "It was not".

Answer: It was not

SPECIAL ISSUE NO. 12:

If you have answered the next above special issue No. 11 "It was", and only in that event, then answer

this Special Issue:

Do you find from a preponderance of the evidence that such negligence, if any, was a contributing cause to the derailment in question?

Answer "It was" or "It was not".

Answer: .....

SPECIAL ISSUE NO. 13:

Do you find from a preponderance of the evidence that H. J. Rucker failed to keep a proper lookout, as that term is herein defined, for the position of the switch handle on the occasion in question?

Answer "He did fail" or "He did not fail"

Answer: He did not fail

If you have answered Special Issue No. 13 "He did fail", and only in that event, then answer the following Special Issue, No. 14.

SPECIAL ISSUE NO. 14:

Do you find from a preponderance of the evidence that such failure, if any you have found, to keep a proper lookout on the occasion in question was a contributing cause of the derailment in question?

Answer "It was" or "It was not".

Answer: .....

SPECIAL ISSUE NO. 15:

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence

would fairly and reasonably compensate the plaintiff JAMES B. HENSLEY, for the injuries, if any, sustained by him as a result of the derailment in question?

In answering the above question, you are instructed by the Court that you may consider the following matters, as the same are outlined to you hereinbelow, and that you will not consider any other element of damage, if any, not specifically enumerated below for your consideration in answering this question:

(a) The physical pain, if any, and the mental anguish, if any, which you believe from a preponderance of the evidence the plaintiff, JAMES B. HENSLEY, has suffered since the date of the derailment here involved up to the present time, as a direct result of the injuries, if any, received by JAMES B. HENSLEY on said occasion; and

(c) The loss of earning capacity, if any, which you believe from a preponderance of the evidence JAMES B. HENSLEY has suffered since the date of the derailment here involved, up to the present time as a direct result of the injuries, if any, received by JAMES B. HENSLEY on said occasion; and

(d) The loss of earning capacity, if any, which you believe from a preponderance of the evidence the plaintiff, JAMES B. HENSLEY, in reasonable probability in the future, from and after this date, will sustain as a direct result of the injuries if any, received by JAMES B. HENSLEY, on the occasion here involved.

In answering this question, if any answer you make herein, you are specifically instructed that you will not consider any doctor bills or medical bills or any other item of expense, if any there were, which have been incurred by the plaintiff up to the present time and you will only consider those matters specifically enumerated for your consideration in Paragraphs (a), (b), (c), and (d) above.

Answer in Dollars and Cents, if any, or none

Answer: $6,500.00

SPECIAL ISSUE NO. 16:

Do you find from a preponderance of the evidence that the plaintiff, Hensley, on the occasion in question, failed to keep such lookout for his own safety in the manner that a reasonably prudent person would have done under the same or similar circumstances.

Answer: "Yes" or "No" Answer: No

SPECIAL ISSUE NO. 17:

If you have answered the above special issue No. 16 "Yes", and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such failure on the part of the plaintiff, Hensley, if you have so found in answer to the next preceding special issue, contributed in whole or in part to the injuries sustained by him on the occasion here involved?

Answer: "Yes" or "No" Answer: .....

SPECIAL ISSUE NO. 18:

Do you find from a preponderance of the evidence that the plaintiff, Hensley, on the occasion in question, failed to make such an inspection of the track as a reasonably prudent person would have made under the same or similar circumstances?

Answer: "Yes" or "No" Answer: No

SPECIAL ISSUE NO. 19:

If you have answered the above special issue No. 18 "yes", and only in that event, then answer this question:

Do you find from a preponderance of the evidence that such failure, on the part of plaintiff Hensley, if you have so found in answer to the next above special issue contributed in whole or in part to the injuries sustained by him on the occasion here involved?

Answer: "Yes" or "No" Answer:

SPECIAL ISSUE NO. 20:

If in answer to any of the special issues contained in this charge you have found that the plaintiff, Hensley, was negligent, or failed to act as a reasonably prudent person, in answer to any of the issues inquiring with reference to the plaintiff, Hensley, and that such negligence, if any, on his part, or failure on his part, if any, to act as a reasonably prudent person, contributed in whole or in part to the injuries sustained by him on the occasion involved, and if you have also found in answer to any of the special issues

that the defendant was negligent or failed to exercise ordinary care, in answer to any of the issues inquiring with reference to the defendant railway company, and that such negligence, if any, or failure, if any, to exercise ordinary care, contributed in whole or in part to the injuries sustained by the plaintiff on the occasion here involved, then answer this question; otherwise, if you have not so found, do not answer this question:

What percent, if any, do you find from a preponderance of the evidence does the negligence, if any, or failure, if any, to act as a reasonably prudent person, on the part of the Hensley bear to the entire negligence, if any, or failure, if any, to exercise ordinary care on the part of the defendant, railway company and the negligence, if any, of the plaintiff, or the failure to exercise ordinary care, if any, on his part?

Answer by stating the percentage, if any you find.

Answer: .....

SPECIAL ISSUE NO. 21:

Do you find from a preponderance of the evidence that the derailment in question was not the result of an unavoidable accident?

By the term "unavoidable accident", as used in the above question is meant an event which is not contributed to in whole or in part by the negligence of the plaintiff, James B. Hensley, or the defendant, Fort Worth & Denver Railroad.

You will answer, "It was not the result of an unavoidable accident," or "It was the result of an unavoidable accident," as you may find.

Answer: It was the result of an unavoidable accident

You are the sole judges of the acts proved, of the credibility of the witnesses and of the weight to be given to the evidence, but in matters of law you must be governed by the instructions in this charge.

A form of verdict is given below, which the Foreman of the Jury will sign when you have answered the above special issues, and you will return your answers into open court as your verdict in this case.

/s/ Floyd James
Judge

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return the same into court as our verdict herein.

/s/.....
Foreman of the Jury

No. 34,368-C

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

JAMES B. HENSLEY

vs.

FORT WORTH & DENVER RAILWAY COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JAMES B. HENSLEY, Plaintiff and before the evidence closed and in the time and manner required by law, requests the court to submit to the jury the following instruction, or in the alternative to submit the substance of the following instruction:

PLAINTIFF'S SPECIALLY REQUESTED INSTRUCTION NO. 1:

You are further instructed that the Federal Employers' Liability Act further provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of its officers, agents, or employees of such carrier. . . ."

GIVEN:

REFUSED:

The above and foregoing Specially Requested In-

struction was duly and timely presented to the court, and a copy of same furnished to opposing counsel.

/s/ Floyd Jones
JUDGE OF SAID COURT

No. 34,368-C

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

JAMES B. HENSLEY

vs.

FORT WORTH & DENVER RAILWAY COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JAMES B. HENSLEY, Plaintiff and before the evidence closed and in the time and manner required by law, requests the court to submit to the jury the following instruction, or in the alternative to submit the substance of the following instruction:

PLAINTIFF'S SPECIALLY REQUESTED INSTRUCTION NO. 2:

You are further instructed that any action brought against any common carrier, such as the defendant, FORT WORTH & DENVER RAILWAY COMPANY, in this case, under or by virtue of any of the provisions of the Federal Employers' Liability Act to recover damages for injuries to any of its employees, such employee, such as the plaintiff in this case, shall not be held to have assumed the risks of his employ-

ment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

GIVEN:

REFUSED:

The above and foregoing Specially Requested Instruction was duly and timely presented to the court, and a copy of same furnished to opposing counsel.

/s/ Floyd Jones
JUDGE OF SAID COURT

No. 34,368-C

IN THE DISTRICT COURT OF TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

JAMES B. HENSLEY

vs.

FORT WORTH & DENVER RAILWAY COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes JAMES B. HENSLEY, Plaintiff and before the evidence closed and in the time and manner required by law, requests the court to submit to the jury the following instruction, or in the alternative to submit the substance of the following instruction:

PLAINTIFF'S SPECIALLY REQUESTED INSTRUCTION NO. 3:

You are further instructed that it was the duty of

the defendant FORT WORTH & DENVER RAILWAY COMPANY to execise ordinary care to provide the plaintiff with a reasonably safe place in which to work and to exercise ordinary care to mtaintain for the plaintiff a reasonably safe place in which to work and that it was incumbent upon defendant to exercise such care commensurate with the use and danger involved in the use of its track.

~~GIVEN:~~

REFUSED:

The above and foregoing Specially Requested Instruction was duly and timely presented to the court, and a copy of same furnished to opposing counsel.

/s/ Floyd Jones
JUDGE OF SAID COURT

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Petition for Writ of Certiorari has been placed in the United States Mail to Mr. Tom Law, Stone, Tilley, Parker, Shubard, Law and Brown, Fort Worth National Bank Building, Fort Worth, Texas, attorney for Respondent herein on this the 17 day of May, 1957.

Dennis C. Shattman

SUPREME COURT, U. S.
JUN 19 1967
JOHN F. DAVIS, CLERK

No. [redacted]186

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES B. HENSLEY, *Petitioner*

v.

FORT WORTH AND DENVER RAILWAY COMPANY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, FORT WORTH, TEXAS

Brief for Respondent In Opposition

STONE, TILLEY, PARKER, SNAKARD, LAW & BROWN
Thos. H. Law
Robert M. Randolph
1500 Fort Worth National Bank Building
Fort Worth, Texas 76102
Attorneys for Respondents

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4970

SUBJECT INDEX

Page

Questions Presented 1

Statement 2

1. The switch handle was not in its slot (socket) 3

2. Respondent learned after the accident that two little boys had played with the switch 7

Argument 14

1. Res ipsa loquitur 14

2. The court's charge 15

Conclusion 21

Certificate of Service 21

INDEX OF AUTHORITIES

Cases: Page

Jesionowski v. Boston & M. R. Co., 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416, 169 A.L.R. 947 (1947) 15

Mills v. Mitsubishi Shipping Co., 358 F.2d 609 (5th Cir. 1966) 19

Sweeney v. Erving, 228 U.S. 233, 57 L.Ed. 815, 33 S.Ct. 416 (1913) 14

Statutes and Rules:

Supreme Court Rule 23(1)(f) 1
28 U.S.C. §2111 20

Texts:

57 Tex.Jur.2d "Trial" §512 17

No. 1417

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES B. HENSLEY, *Petitioner*

v.

FORT WORTH AND DENVER RAILWAY COMPANY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, FORT WORTH, TEXAS

Brief for Respondent In Opposition

The Respondent, Fort Worth and Denver Railway Company, prays that a writ of certiorari to review the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, be denied.

QUESTIONS PRESENTED

No federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Petitioner has wholly failed to comply with the requirement of Supreme Court Rule 23 (1) (f), for the reason that Petitioner is unable to show from the record a timely and proper raising of any federal question.

Even had Petitioner properly preserved his grounds for complaint, the state trial and appellate courts did not misconstrue the federal decisions on res ipsa loquitur nor act contrary to any substantive right of Petitioner, as asserted by him.

STATEMENT

Petitioner's statement of the nature of the suit is at best misleading. His recitation of the facts explaining the derailment bears no recognizable similarity to the factual impact of the full record. The record shows that the derailment was caused by two little boys who played with the switch, there being nothing wrong with the switch itself. The jury obviously so believed; they found for Respondent, and the Court of Civil Appeals sustained their finding.

Petitioner takes alternative positions on the facts. First, he says that all things at the switch apparently were as they should have been — most importantly, the switch handle was in its socket on the switch— and that the accident happened without explanation, necessitating a finding for Petitioner on res ipsa loquitur. (Petition, p. 3) Second, he says that Respondent discovered that the switch handle was out of its slot but, having so discovered it and realizing the potential grave danger, nevertheless inexplicably failed to replace the handle in the slot; instead, that Respondent set in motion all its resources to determine who might have taken the handle out of the slot, conducting a full investigation and finally apprehending the two little boys, yet still never bothering

to correct the condition (the handle out of its slot) that resulted in all this activity! While this contention appears absurd on its face, it is not necessary for Respondent to rely on the absurdity alone in answer to it: it is clear from the testimony that Respondent made the discovery of the switch handle's being out of the slot only *after* the accident. (S.F. 214, 216, 226, 229-230, 261-262, 266-267, 276-277, 295-297) (The record not yet having been printed, references are to the Statement of Facts [S.F.], the Transcript [Tr], Plaintiff's Exhibits [PX] and Defendant's Exhibits [DX].)

1. The switch handle was not in its slot (socket)

The "Alley Lead" is an industry track serving several industries in Plainview, Texas. A track known as the "Magnolia spur," being a straight extension of the Alley Lead track, ties onto the Alley Lead at the beginning of a curve. A switch known as the "Magnolia switch" controls direction of movement at this track junction.

The directional movement at this switch is determined by the position of the "switch points," the pointed ends of the track which move from side to side and determine the track down which the flanged wheels are guided. (PX 8, 13) The two switch points are connected to each other by two "bridle rods." The whole apparatus is connected to an upright switch, the Magnolia switch, by a "connecting rod," which moves the switch points from side to side. The upright switch stands on a tripod, or "switch stand." A ver-

tical rod is tied to the connecting rod at the bottom end, a handle in the middle and a disk or "target" at the top. The position of the handle determines the position of the connecting rod and of the switch points. The target moves with the vertical rod and indicates the position of the switch points. The handle is secured by placing it in a slot or socket cut at the two proper positions in a metal plate. The handle is doubly secured in a slot by use of a small, horseshoe-shaped rod known as a "keeper."

During a switching movement, when the engine is pushing the cars, a brakeman rides on the leading end of the movement. The position of the switches is checked by observing the position of the switch points themselves and may be double-checked by observing the position of the target. This technique is considered by the industry to be safe, reasonable and prudent. (S.F. 257, 380-382, 423-424, 425) A brakeman approaching the Magnolia switch from the north (as in this case) would find his view of the handle largely obstructed by the switch stand. (S.F. 380-384) At night, a brakeman's view of the Magnolia switch handle would be even more obscure, since the area is not lighted. (S.F. 194)

Petitioner argues that the switch handle was in its proper socket and the points were properly aligned, but that the movement of the cars over the switch somehow unseated the handle and caused the switch points to open partially, thereby causing the cars to "split the switch" and derail, invoking the doctrine of res ipsa loquitur due to an unknown defect in the

switch. (Petition, p. 3) Petitioner's contention is based solely on the deposition testimony of Harvey J. Rucker, the brakeman on the leading end of the switch movement at the time of the accident. Mr. Rucker was led by belligerent interrogation into saying that he saw that the Magnolia switch handle was in the slot. (S.F. 195-196) This is the only evidence that the handle was in the slot prior to the movement.

Petitioner failed to sustain his burden of showing that the switch was defective, because the preponderance of the evidence does not show that the handle was in the slot. On the contrary, it shows that the handle was out of the slot, having been taken out by two little boys, and that this is what caused the derailment. Harvey J. Rucker testified upon trial that the points and the target were properly aligned. He did not shine his light on the handle, since the points and targets are the indicators. Anyway, he could not have seen the handle on the Magnolia switch at night from the north side. (S.F. 266-267, 270-271) T. S. Dial, the conductor, testified that one who approaches the Magnolia switch from the north would not be able at night to see whether the handle is out of the slot slightly, enough to allow free movement of the switch. (S.F. 257) L. B. Griffin testified that a brakeman on the right side of a car (Rucker's position) could not have seen whether the Magnolia switch handle was actually in the slot, since his view would have been blocked by the switch stand. (S.F. 383-384) Wm. H. Hogle testified that a brakeman in Rucker's position would have had to stop the train and walk over to the switch in

order to ascertain, with greater certainty than that indicated by the points and targets, that the handle was in the slot. (S.F. 410-411) Such action would not be normal or necessary in reasonable and prudent operations in the railroad industry. (S.F. 411)

Immediately after the accident, the switch handle was found out of the slot, resting on the plate. (S.F. 215-216, 277, 297) The switch was not damaged. (S.F. 240-242, 279, 291, 331-332) If in fact the handle had been secured in the slot and the wheel had split the switch due to a defective wheel or defective switch point, the bridle and connecting rods would have been bent or the switch points would have been broken, since the parts move in unison. (The handle could not be jarred or vibrated out of the slot. [S.F. 230-231])

On the other hand, assuming the handle was out of the slot just enough to be resting on the plate, the switch points would be free and the vibration of cars moving over the switch points would cause the points to move. This is what happened here. The handle not being secured, it moved with the points. The splitting of the switch by the vibration caused a derailment. (S.F. 224-225, 242, 270, 297-298) In the instant cause, the first car and leading truck of the second car passed safely through the switch and derailed. It was apparent that the switch was properly aligned when the first car passed through it, but following this vibration, the switch points split.

Not only does the evidence show that the switch points moved, derailing the train, because the handle was out of the slot, it also shows that the handle's

being out of the slot was a condition arising shortly before the accident. The crew involved in this accident had executed switch movements over the Magnolia switch earlier that same day without any mishap. (S.F. 265-266) In addition, the keeper on the Magnolia switch, which doubly secures the handle in the slot, was found after the accident on the ground about two feet away from the switch stand. The keeper could not have been dislodged from the handle by the derailment. Nor could the keeper have been on the ground very long, because it was in place when the switch was inspected the week preceding the accident, and it had not been on the ground long enough to become rusty. (S.F. 330-333)

The great weight of the evidence is consistent with Respondent's theory that the switch handle was out of the slot and that the vibration of the first car split the switch. It is inconsistent with Petitioner's theory that the handle was in the slot but was jarred out due to some unknown defective condition.

2. Respondent learned after the accident that two little boys had played with the switch

Joe Rodriquez was nine years old at the time of trial and would have been seven or possibly six at the time of the accident. (S.F. 355) He testified that one afternoon in October, 1963, when he was in the first grade in a Plainview school, he and another little boy named Joe left school later than usual. On their way home, they took a short cut by the railroad tracks. (S.F. 350-352)

"Q. And what happened down there at the railroad tracks, just tell the first thing that happened?

"A. I stopped to see something.

"Q. You stopped to see something?

"A. Yes, sir.

"Q. And did Joe do something?

"A. Yes, he went to the big thing there.

"Q. And what did he do?

"A. He pulled the thing down.

"Q. He pulled something down?

"A. And two things went down. And he couldn't find one thing.

"Q. He pulled something by the railroad track, did he,

"A. Yes.

"Q. And you say two things went down.

"A. I saw two things come out.

"A. Two things came out.

"A. Yes.

"Q. What did they look like — was one of them a little piece of metal,

"A. Yes, sir.

"Q. Now, what was it that he pulled down; was it a handle or what?

"A. It was a handle; like a handle.

"Q. Like a handle?

"A. Yes, sir.

"Q. Let me show you a picture here and see if it looked kind of like this thing. Joe, here is a picture and this is marked Plaintiff's Ex. 10; I don't guess you know what Plaintiff's Exhibit 10 is.

"A. It was a thing like this (indicating on picture).

"Q. It was a thing like this, and you are showing me this black thing in the picture; is that right?

"A. Yes, sir.

"Q. And that is what we call an up-right switch; I don't guess you knew what we called it, did you?

"A. No.

"Q. Is that what it looked like?

"A. Yes, and he pulled something.

"Q. And he pulled something on that big black thing?

"A. Yes, sir, and two things came out, a round thing like metal and the other thing like a handle.

"Q. All right. There was a round thing, like a little piece of metal that came out?

"A. Yes, sir.

"Q. And then there was a handle that came out too; is that right?

"A. We couldn't find the little piece.

"Q. All right. You couldn't find the little metal piece; is that right?

"A. Yes, sir.

"Q. But the handle was still on this big black thing; is that right. Was there a handle on here?

"A. Yes, sir.

"Q. All right. Now, did you try to put that — did you or he try to put that handle back?

"A. Both of us.

"Q. Both of you did?

"A. Yes, sir.

"Q. Could you put it back where it was?

"A. We tried and tried, but we couldn't.

"Q. You couldn't do it.

"A. And we started running."

(S.F. 352-355)

It is the Petitioner's alternative position on the facts that Respondent discovered the switch's condition, initiated an investigation and found and interviewed Joe Rodriquez that same afternoon, but with-

out replacing the handle in the slot. (Petition, pp. 4-5) Petitioner did not request a special issue on Respondent's alleged negligence in not replacing the handle in the slot, but instead apparently contends that such alleged failure destroys Respondent's explanation of the accident's cause and entitles Petitioner to a verdict based on res ipsa loquitur, as a matter of law.

Armond R. Cardinal, Assistant Chief of Police in Plainview at the time of the accident, testified that he assisted in the investigation of a derailment caused by someone's tampering with Respondent's switch about the middle of October, 1963. He and Respondent's investigator, Mr. Bradshaw, worked on the case. The boys they investigated were members of transient worker's families. (S.F. 340-348) Joe Rodriquez testified that he lives in El Paso and used to live in some other towns, including Plainview, where he and his friend played with the switch in October, 1963. He identified the switch as being of the same type as that in the picture of the Magnolia switch shown on Plaintiff's Exhibit 10. Later on a policeman and a railroad man came to see him and talked to him and his mother about the matter. (S.F. 349-356) Mrs. Eva Rodriquez, Joe's mother, testified that two men, "policemen from the railroad," came to see Joe a little before 5:00 o'clock one afternoon in the middle of October, 1963. Joe told them he had played with the switch. (S.F. 357-362) The evidence certainly is sufficient to permit the jury to believe, as they obviously did, that the switch involved in this investigation was the same switch involved in the accident.

Petitioner argues that the record shows that the

policeman and railroad man talked to Joe the same afternoon he had played with the switch, before the accident, and that no one had replaced the handle in the slot even though its condition was discovered prior to the accident. Petitioner's contention is based upon statements of Joe and of Mrs. Rodriquez, elicited on cross-examination, that the two men came to the house the same day Joe had played with the switch. (S.F. 356, 359, 360) The testimony thus given was in the form of "Yes" or "No" answers to leading questions. One witness was a nine year old boy; the other was a transient laborer's wife who was examined through an interpreter.

Joe testified that he left school later than usual that day and walked home, taking a short cut by the railroad track, where he and his friend played with the switch. (S.F. 351) Mr. Cardinal, the policeman, stated:

> "Q. And I will ask you whether or not you assisted in an investigation to determine whether someone *had tampered with a switch that caused a derailment* on the Fort Worth & Denver . . . on a Fort Worth & Denver industry track?
>
> "A. Yes, sir.
>
> "Q. And do you recall about when that was?
>
> "A. About the middle of October, 1963.
>
> "Q. All right. How did you go about making your investigation and what did you do?
>
> "A. Well, at first, Mr. Bradshaw came to the office and *told us what happened*, and so I went with him, and being kind of acquainted in the Mexican part of town and got to talking to first

> one kid and another that had returned from school, naturally they accumulate like wild birds, and they showed us about where those kids that run from . . ." (S.F. 340-341) (Emphasis supplied.)

It is apparent that Mr. Bradshaw, the railroad man, told the police "what happened," he told them that "someone had tampered with a switch *that caused a derailment* . . ." This is the "what happened" described immediately prior to Mr. Cardinal's use of the term, and the jury present would have properly so understood. After Mr. Bradshaw told the police about the "switch that caused a derailment on the Fort Worth & Denver," the two of them went to the Mexican part of town and questioned a number of children. The two men ultimately arrived at Joe's house to question him a little before 5:00 o'clock one afternoon. (S.F. 356, 358) The accident occurred between 7:00 and 8:00 on the evening of October 12.

For two reasons, it is clear that the sequence of events above described did not occur on the same afternoon. In the first place, Mr. Bradshaw went to the police *after the derailment*, since he told them at that time both of the discovery of the switch's condition and of the derailment. The afternoon on which Bradshaw and Cardinal went to Joe's house had to be a different day from the day on which Joe had played with the switch. The derailment would not yet have occurred at the time they talked to Joe (5:00 p.m.), for the occasion for talking to Joe was the occurrence of the derailment (7:00 p.m.). In the second place,

the jury could properly draw a reasonable inference from the events which transpired, rather than an absurd inference. It would not have been likely, if even physically possible: (1) for Joe and his friend to play with the switch after leaving school later than usual; (2) for someone to discover the switch handle out of the slot, *without replacing it in the slot* by a simple movement of the hand; (3) for that someone to inform Bradshaw that the switch had been tampered with; (4) for Bradshaw to go to the police; (5) for Cardinal and Bradshaw to question a number of children; and (6) for the two men to arrive at Joe's house "a little before five" o'clock.

The jury rejected the physical improbability of all these things happening at the end of a single afternoon, probably in the space of less than an hour and a half. The jury rejected the absurd inference that the discoverer of a switch's condition disobeyed company rules by not securing the switch handle, but complied with company rules by reporting his discovery. The jury rejected the further absurd inference that, even after talking with Joe, the railroad man and policeman did not secure the handle, but left it open to cause a derailment. The jury had abundant support in the evidence to find that the playing with the switch and the visit to Joe's house occurred on different days. Their finding is supported by explicit testimony and by a reasonable inference drawn from the testimony. The jury, who saw the trial, were amply justified in rejecting the "Yes" or "No" answers of Joe and Mrs. Rodriquez, made in reply to an artful cross-exam-

ination. The jury's finding that Petitioner had failed to sustain his burden of proof, is supported by evidence and is supported by sufficient evidence.

ARGUMENT

We have stated the facts in such detail because Petitioner's contentions are wholly dependent upon the theory that the jury found an unavoidable accident only because they believed he assumed the risks of his employment. (Petition, pp. 3-5, 9) The jury found that neither Petitioner nor Respondent was negligent and that the derailment was an unavoidable accident. "Unavoidable accident" was defined as an event not contributed to by the negligence of either party. It is obvious that the jury believed Respondent's explanation that the accident was caused by the two little boys. Petitioner's argument that the jury so found because they thought he had assumed the risks of his employment is mere conjecture.

1. Res Ipsa Loquitur

Petitioner claims that he is entitled to judgment, as a matter of law, under the doctrine of res ipsa loquitur. Respondent believes the facts shown in the Statement amply explain the cause of the accident, and the jury so found.

We have no quarrel with the cases on res ipsa loquitur cited by Petitioner. In *Sweeney v. Erving*, 228 U.S. 233, 57 L.Ed. 815, 33 S.Ct. 416 (1913), the following language appears:

"Where the circumstances of the occurrence

> that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, res ipsa loquitur — the thing speaks for itself — that is to say, *if there is nothing to explain or rebut the inference* that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence." (Emphasis supplied.)

Likewise, in *Jesionowski v. Boston & M. R. Co.*, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416, 169 A.L.R. 947 (1947) the court stated:

> "It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but *although the respondent offered evidence to establish this fact it did not satisfy the jury.*" (Emphasis supplied.)

Explanation of the accident having been offered and properly accepted by the jury, there is no ground for a finding, as a matter of law, for Petitioner. The Court of Civil Appeals correctly sustained the trial court. (Petition, pp. 16-17)

2. The Court's Charge

Petitioner belabors the supremacy of federal substantive law in the F.E.L.A. field. We certainly do not disagree with the statement of the law, nor did the Court of Civil Appeals. (Petition, pp. 18-19) However, Petitioner has not shown that any Texas procedure

followed in the instant cause conflicted with federal substantive law, resulting in harmful error.

The reason Petitioner's three requested instructions supposedly should have been given, is that they "are a variant and departure from the usual rules governing the relationship of master and servant at common law. Without knowledge of the standard to be followed, and against which to measure the conduct of the master, it was not possible for the jury to intelligently answer" the special issues. (Application for Writ of Error, p. 18) In other words, it is reversible error not to instruct the jury generally on the law, where it varies from the common law.

Petitioner cites no authority for this novel proposition, though he apparently regards it as a substantive federal right which must be given effect over local law to the contrary. Nor does Petitioner offer any reason why the jury should be instructed on federal statutory modifications in the common law in cases in which the jury would not ordinarily be instructed on the common law itself. If the jury is presumed to know the law, it must be presumed to know all the law and not just the common law, unmodified by statute.

In fact, of course, the Court instructed the jury on so much of the law as it was necessary for the jury to know, and such instructions conformed with federal substantive F.E.L.A. law. (Tr. 17-19, 30) Nor was the jury permitted to speculate upon any supposed knowledge of unmodified common law, the Court instructing the jury that "in matters of law you must be governed by the instructions in this charge." (Tr. 30) For

the Court to have instructed the jury on the law, simply because it was a modification of the common law, would have amounted to a general charge on the law and error. 57 Tex.Jur.2d "Trial" §512.

No credence can be given to Petitioner's novel contention that instructions on the law must be given simply because the common law has been modified. Rather, each requested instruction must be tested on its own merits as to whether it was substantially correct and necessary. Petitioner apparently complains in this Court only of the trial court's refusal to instruct the jury on assumed risk, dropping his contentions as to the other two instructions requested.

Petitioner's Specially Requested Instruction No. 3 states:

> "You are further instructed that any action brought against any common carrier, such as the defendant, FORT WORTH & DENVER RAILWAY COMPANY, in this case, under or by virtue of any of the provisions of the Federal Employers' Liability Act to recover damages for injuries to any of its employees, such employee, such as the plaintiff in this case, shall not be held to have assumed the risks of his employment in any case where such injury resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

In the first place, a defense of assumed risk had not been pled, and the issue was not in the case. (Tr. 9-11) Petitioner claims, nevertheless, that such an instruction should have been given and that failure to do so was error due to an implied finding of assumed risk

is by the jury. The alleged implied finding of assumed risk is based on an argument that since either Petitioner or Respondent had to have been negligent, and neither was found negligent, but rather an unavoidable accident was found, the jury must have thought Petitioner assumed the risk of unsafe conditions. Therefore, continues Petitioner, the failure to instruct generally on the law of assumed risk caused the jury, in their ignorance of the modification of the common law, to find against Petitioner on the issues of safe condition and unavoidable accident. This is all coupled with an argument that submission of an unavoidable accident issue in a trial before a federal court, submitted to the jury on special interrogatories, though not error, is not good judicial administration, and that the State courts are bound to follow the same rule. (Petition, pp. 7-10)

The central fallacy in Petitioner's imaginative argument is the assumption that one of the two parties to this suit had to be responsible for the accident. The evidence shows that third parties — the two little boys — were the cause of the accident, and that neither Petitioner nor Respondent was at fault. The jury's answers show that they considered neither party to be at fault. The jury's answer to the issue on unavoidable accident conclusively shows that they believed and found the accident to have been caused by the little boys. (Tr. 20-29) The great weight of the evidence supports these findings, and the findings certainly are not contrary to the weight of the evidence. This being so, we certainly cannot assume with Petitioner that

the jury impliedly found an assumption of risk by Petitioner. Nor can we pile assumption on assumption, that submission of Petitioner's instruction on assumed risk would have led to a different result, there being no properly supported point of error that the jury improperly considered assumed risk at all. The jury's findings of no negligence and unavoidable accident indicate simply that they considered the little boys to be the cause, not Petitioner's imaginative theory based upon a disregard of the evidence.

Petitioner quotes at length from *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609 (5th Cir. 1966), apparently contending that the finding of unavoidable accident should be disregarded in determining whether the jury impliedly found an assumption of risk. In any event the case is not cited in support of any supposed error arising from submission of the unavoidable accident issue. The *Mills* case was tried in federal court and submitted to the jury on special interrogatories. The jury found no negligence by either party and unavoidable accident. The Court of Appeals reviewed the evidence at great length and found negligence (unseaworthiness) as a matter of law. The court then found that the finding of unavoidable accident would be controlled by the finding on defendant's negligence. The court stated that the submission of unavoidable accident was a mere cross-examination of the jury's answers on plaintiff's and defendant's negligence, causation and percentage reduction of damages. The court considered that unavoidable accident "*ordinarily*" ought not be sub-

mitted, as a "matter of good judicial administration," but certainly did not indicate that submission would constitute reversible error, especially since a finding on unavoidable accident is controlled by the findings on negligence. In the instant cause the issue was properly submissible even under the federal rule, since the answer would clearly reveal the causation found by the jury, as answers to the negligence issues alone would not have done. No objection was made to submission of this issue, nor has error been assigned in the motion for new trial and Petitioner's brief in the Court of Civil Appeals. (Tr. 34) Even if there were error, which we do not believe, Petitioner did not preserve it. Even if there were error, it would have been harmless, since the finding on the unavoidable accident issue explains and supports the findings on the negligence issues, rather than conflicting with them as in the *Mills* case. In any event, no error is shown which would "affect the substantial rights of the parties." 28 U.S.C. § 2111.

Other than the contentions that the jury must be instructed generally on modifications in the common law and that we must *assume* that the jury improperly deemed Petitioner to have assumed the risk, which would have been prevented by an instruction on assumed risk, Petitioner presents no authority supporting his third requested instruction. The submission of such an instruction would have been erroneous as being a general charge on the law, in addition to being a charge on an issue not even involved in the case.

CONCLUSION

Respondent prays that the Court deny the petition for writ of certiorari.

Respectfully submitted,

STONE, TILLEY, PARKER, SNAKARD, LAW & BROWN

By _____
Thos. H. Law

_____
Robert M. Randolph

1500 Fort Worth National Bank Building
Fort Worth, Texas 76102
Attorneys for Respondent

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief for Respondent in Opposition has been placed in the United States Mail by certified mail, return receipt requested, addressed to Mr. Denning Schattman, Spurlock & Schattman, 304 Union Bank Building, Fort Worth, Texas 76102, attorney for Petitioner herein, on this 14 day of June, 1967.

_____
Thos. H. Law